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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1653

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.
HARRY DEMONTMOLLIN,
FLORIDA ALL STATE CONSOLIDATORS, INC.
NEW JERSEY SHIPPERS POOLING ASSOCIATION, INC.

and

SUNSHINE STATE SHIPPERS AND
RECEIVERS ASSOCIATION, INC.

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

BRIEF IN OPPOSITION FOR RESPONDENT FREIGHT FORWARDERS INSTITUTE

JAMES N. JACOBI
KURRUS AND ASH
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

S. SIDNEY EISEN
EISEN AND MITCHELL
370 Lexington Avenue
New York, New York 10017

Attorneys for Respondent
Freight Forwarders Institute

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INTERSTATE COMMERCE COMMISSION

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BRIEF IN OPPOSITION FOR RESPONDENT FREIGHT FORWARDERS INSTITUTE

Freight Forwarders Institute is a voluntary non-profit trade association of regulated freight forwarders operating under Part IV of the Interstate Commerce Act. 49 U.S.C. § 1001, *et seq.* Its constituent and interested mem-

bers in this matter are listed in Appendix A. Its prime purpose is to protect, promote, foster and advance the interest of its members, and to that end it is empowered to and does participate, on behalf of its members, in administrative and judicial proceedings where issues important to freight forwarders are involved. Freight Forwarders Institute intervened in the Interstate Commerce Commission (ICC) proceeding below as an interested party and participated in the Court of Appeals Hobbs Act review proceeding in the District of Columbia Circuit. Determination of the principal issue herein will materially affect and influence the continued viability and existence of regulated freight forwarding.

OPINIONS BELOW

The *per curiam* judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 24, 1977, appears at Petitioner's Appendix A, p. 1a. An accompanying memorandum appears at Petitioner's Appendix B, p. 1b.

The underlying administrative agency decisions are (a) the Initial Decision of Administrative Law Judge William J. Gibbons of the ICC, Docket No. FF-C-50, appearing at Petitioner's Supplemental Appendix, p. 3, (b) the Report of the ICC, 350 I.C.C. 391-423 (1975), appearing at Petitioner's Supplemental Appendix, p. 53, (c) the cease-and-desist order of the ICC issued July 11, 1975, appearing at Petitioner's Supplemental Appendix, p. 107, (d) Order of the ICC denying Petition for Reconsideration, appearing at Petitioner's Supplemental Appendix, p. 108, and (e) Order of the ICC denying petition requesting finding of General Transportation Importance, appearing at Petitioner's Supplemental Appendix, p. 110.

JURISDICTION

The unpublished order and judgment of the Court of Appeals was entered February 24, 1977. The petition for

writ of certiorari was timely filed May 25, 1977. Jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a) (1970).

QUESTION PRESENTED

Whether the ICC was correct in finding that a shippers' association is ineligible for membership in another "association of shippers," because such membership subjects the latter to regulation as a freight forwarder.

STATUTES INVOLVED

Sections 402(a)(5) and 402(c)(1) of the Interstate Commerce Act, 49 U.S.C. §§ 1002(a)(5) and 1002(c)(1) (1970) appears at Petitioner's Appendix C. Of particular importance is Section 402(c)(1) which exempts from regulation as a freight forwarder the following:

> (1) . . . operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purposes of securing the benefits of a carload, truckload, or other volume rates . . . .

STATEMENT OF THE CASE

Petitioner for certiorari American Institute of Shippers' Association (AISA) intervened before the ICC in support of Petitioner Sunshine State Shippers and Receivers Association, Inc. (Sunshine) which was organized under the laws of Delaware in 1971 as a nonprofit corporation for the purpose of consolidating and distributing freight as an unregulated association of shippers ("retailers, jobbers, wholesalers or manufacturers") under Section 402(c)(1) of the Interstate Commerce Act.

Sunshine membership, however, consisted not only of individuals or businesses, but also of other shippers' associations that claimed exemption under Section 402(c)(1) of the Interstate Commerce Act. Petitioner New Jersey Shippers Pooling Association, Inc. (New Jersey Shippers) was typical of such shippers' association and, *inter alia*, was a member of Sunshine.

On January 29, 1973, the ICC on its own motion undertook an investigation of Sunshine with the purpose of determining whether Sunshine had been operating as a freight forwarder as defined in Section 402(a)(5) and was thereby in violation of Section 402(c)(1). The Administrative Law Judge Gibbons found that Sunshine was not operating as a bona fide shippers' association where it had allowed other shippers' associations to be members. The ICC adopted the Initial Decision of Judge Gibbons to find that Sunshine had been operating as a freight forwarder and issued a cease-and-desist order. 350 I.C.C. 391-423.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed *per curiam* the ICC decision. (Petitioner's Appendix A, p. 1a) In its Memorandum Opinion the Court noted that Sunshine could bring itself into compliance with the cease-and-desist order by enrolling each member of its member associations as Sunshine members. (Petitioner's Appendix B, p. 1b). The Circuit Court properly found that the ICC had not acted unreasonably in its statutory interpretation of Section 402.

REASONS FOR DENYING THE WRIT

I. THE DEFINITIONAL ELEMENTS OF A SHIPPERS' ASSOCIATION PRECLUDE ITS MEMBERSHIP IN AN "ASSOCIATION OF SHIPPERS"

The underlying objective of Section 402(c) of the Interstate Commerce Act has always been to preserve to shippers the ability to secure reduced rates—truck-

load, carload, or volume rates—through consolidation of their freight. Through compliance with Section 402(c) a "shipper, or a group or association of shippers . . ." may benefit from statutory exemption from regulation as a freight forwarder. In order to qualify as a "group or association of shippers" certain elements must be met. The members of the shippers' association as principals must (1) have direct beneficial interest in the freight consolidated, (2) the association must act as the agent for the bona fide members who as principals control the activities and affairs of the association, and (3) the association must act as the agent for the bona fide members of the association who as principals assume the operational risks involved. A shippers' association cannot comply with these requirements if it includes in its membership another association of shippers.

A. If It Includes In Its Membership Other Associations Of Shippers, A Shippers' Association Is Not The Requisite Holder Of The Beneficial Interest Of Consolidated Freight.

The ICC has always considered the shipper referred to in Section 402(c) to be the beneficial owner of the freight, for only the beneficial owner directly benefits from the freight consolidation. It is clear that shipper associations, *per se*, have no freight of their own to consolidate. The legislative history underscoring Section 402(c) clearly shows the intent to have that section applied only to shipper associations as they normally operated. No shipper association has ever functioned as Sunshine seeks to do—by being a group, not of shippers (beneficial owners), but an association, group or federation of shipper associations.

Section 402(b) illuminates the objective of Section 402(c). Section 402(b) deals with agricultural cooperatives and by its specific terminology extends exemption from

regulation to cooperative associations or to "a federation of such cooperative associations". Congress when it intended to include federations in Section 402(b) did so by using definite and specific language. By abstaining from the use of such or similar language or even mentioning federations in Section 402(c), Congress clearly evidenced an intention to exclude federations of shipper associations from the scope of Section 402(c).

The District Court in *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692 (S.D.N.Y. 1964) clearly set forth the basic differences between a bona fide shipper association and a regulated freight forwarder, as follows:

> Shipper associations do not hold themselves out to the general public, but perform services for their dues paying members . . . Members bear the burdens as well as share the benefits of its operations. . . . The operation . . . must be conducted by the association which at all times acts as agent for its shipper members who, as its principals (1) possess the exclusive right and ability to control the operations and (2) assume the essential risks entailed in conducting such operations. 230 F. Supp. 692, 696.

The bona fide member of a shipper association, of necessity, must be the principal and the association the agent. When shipper association A becomes a member of shipper association B, who is the principal and who is the agent? If shipper association A is the principal of shipper association B (here Sunshine) then do shipper association A's member principals automatically become principals of shipper association B? If so, they are principals who cannot exercise "the exclusive right and ability to control the operations" of shipper association B, because they are not members of shipper association B and, therefore, have no right to vote and, accordingly, are not covered by the parameters of Section 402(c).

If shipper association A, the member shipper association and the principal, is not the beneficial owner, then the consolidation is performed for nonbeneficial owners and, accordingly, is not a consolidation which has for its purpose securing for the bona fide shippers the benefits of consolidated rates. Therefore, the activity involved is not covered by Section 402(c).

Because of a repetitive history of non-payment of freight charges by shipper associations, the ICC promulgated regulations (49 C.F.R. § 1320.1 (1976)) requiring shipper associations to disclose in their transportation documents, issued to the underlying carriers (the railroads and trucks) the names of the beneficial owners of the property involved, for the obvious purpose of protecting the underlying carriers for beneficial owners cannot be insulated against the payment of their freight charges.

Transposing that situation to the instant case reduces it to these simple facts. Shipper association A seeks membership in Sunshine. Sunshine, by regulation, must disclose the names of the beneficial owners in its transportation papers when it tenders consolidations to the underlying carriers. Sunshine cannot list shipper associations A in its transportation papers, for shipper association A is not the beneficial owner of the property. If Sunshine lists the individual beneficial owners, who are members of shipper association A—but not members of Sunshine, Sunshine would admittedly be providing services to nonmembers and thus servicing the public at large. Under these facts, Sunshine's operations would not come within the purview of Section 402(c).

B. The Members Of A Shippers' Association Do Not Exercise The Requisite Control Where The Shippers' Association Is The Member Of An Association Of Shippers.

The shipper must have the exclusive right and ability to control the operations of Sunshine, an essential definitional element of a shippers' association. *Freight Con-*

solidators Cooperative, Inc. v. *United States*, 230 F. Supp. 692, 696 (S.D.N.Y. 1964); *Atlanta Shippers' Assn., Inc. —Investigation*, 332 I.C.C. 273, 285 (1964); *American Institute for Shippers' Association, Inc., et al.* v. *Interstate Commerce Commission*, 350 I.C.C. 391, 399 (1975). For example, the members of New Jersey Shippers exercise their individual control only over the activities and operations of New Jersey Shippers. New Jersey Shippers is a member of Sunshine. The individual members of New Jersey Shippers, not being members of Sunshine, have no voice in the formulation of policies or management of Sunshine, and are thus unable to direct the policies of Sunshine. The ICC found these individual members, in so far as they relate to Sunshine, to be members of the general public and "not dues-paying members of Sunshine." 350 I.C.C. 391, 404. Where there is a holding out of service to the general public, the association is acting as a freight forwarder and not a bona fide shippers' association.

"No privity exists between shipper-members of Sunshine and members of its purported member associations." 350 I.C.C. 391, 410. No control may be exercised by the members of New Jersey Shippers unless they join Sunshine individually as suggested by the ICC and approved by the Court of Appeals. *See* Petitioner's Appendix B, p. 1b. Thus, a shipper's association cannot be a member of an association of shippers.

C. Individual Shipper Members Must Assume Operational Risks As Principals With The Shippers' Association Acting As Agent.

The bona fide member of a shipper association, of necessity, must be the principal and the association the agent. *See Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692, 696 (S.D.N.Y. 1964). In normal operation, the individual members of a shippers' association assume the risks entailed in conducting the operations.

Sunshine had been acting as a freight forwarder by holding out its service to non-dues-paying members. As individual members of a member shippers' association, these shippers are not in privity with Sunshine in the transportation of the consolidated freight. Thus, there was in essence a public holding out of Sunshine's services.

II. PETITIONER'S RELIANCE ON *COLUMBIA SHIPPERS AND RECEIVERS ASSN., INC.* v. *UNITED STATES* IS MISPLACED

Petitioners rely on *Columbia Shippers and Receiver's Assn., Inc.* v. *United States*, 301 F. Supp. 310 (D. Del. 1969) to support the rationale that membership by one shippers' association in another shippers' association satisfies the statutory objective of furthering nonprofit activities. *Columbia* is easily distinguished from the present facts. *Columbia* involved the practice of co-loading freight between nonprofit shippers' associations. It did not involve the issue of one shippers' association's membership in another shippers' association. The practice of co-loading substantially differs from the public holding out of services practiced by Sunshine to non-dues-paying members. *See* 350 I.C.C. 391, 406-07.

Pacific Coast Wholesalers' Association, Investigation of Status, 264 I.C.C. 134 (1945), *aff'd Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Cal. 1949), *aff'd per curiam* 338 U.S. 689 (1950), involved one shippers' association transporting freight between non-members and member consignees for a special price. As the ICC correctly found *Pacific* did not address the issue of one shippers' association's membership in another shippers' association. 350 I.C.C. 391, 406.

Appellants sought an interpretation of Section 402(c) which would permit shipper associations to so serve the public generally would destroy regulated freight for-

warding and the viability of Part IV of the Interstate Commerce Act. Obviously, regulated freight forwarders cannot exist in the competitive arena with completely unregulated, unrestrained and unfettered competitors, such as Sunshine seeks to become.

Clearly, Congress in painstakenly writing a comprehensive set of freight forwarding regulations (Part IV of the Interstate Commerce Act, § 401 *et seq.*, 49 U.S.C. § 1001, *et seq.* (1970)) did not so write Section 402(c) to destroy and make for nought the entire legislative scheme. But that is what appellants contend and the Interstate Commerce Commission resists. If regulated freight forwarding is to continue as a viable mode of transportation, the Interstate Commerce Commission must be supported in the efforts to stay the erosion of regulated freight forwarding and otherwise prevent the complete destruction of the Congressional scheme of regulation.

This is a case of first impression. No other case cited or discussed by appellants involves the issue raised here, namely the pyramiding of membership in a shippers' association through the device of a federation of shipper associations. For this reason, all cases cited by appellants are inapposite. The Court below was correct in affirming the Commission's inherent finding that Sunshine's operation was and is clearly contrary to the basic scheme of regulation and the specific intent of Section 402(c) of the Act.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

By _____

JAMES N. JACOBI
KURRUS AND ASH
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

By _____

S. SIDNEY EISEN
EISEN AND MITCHELL
370 Lexington Avenue
New York, New York 10017

Attorneys for Respondent
Freight Forwarders Institute

APPENDIX A

FREIGHT FORWARDERS INSTITUTE MEMBERS

Acme Fast Freight
Andrews International
Century Carloading
Clipper Express
Coast Carloading
Con Tra Mar
Florida-Texas
Lyons Transport
Merchant Shipper/Stor Dor
New England Forwarding
Ohio Fast Freight
Republic Freight System
Sheldon Forwarding
Springmeier Shipping
Superior Fast Freight
Texas Shippers
Transconex
Universal Carloading
Western Carloading
Western Freight Assn.
Westransco
Yellow Forwarding